No. 18409

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK URSICH,

Appellant,

vs.

MANUEL G. DA ROSA, ANTONIO GARCIA DA ROSA, MARIA A. ROSA, VICTORINO GARCIA DA ROSA and MARY ROSA SANTOS,

Appellees.

APPELLEES' BRIEF.

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TABLE OF AUTHORITIES CITED

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ARGUMENT OF THE CASE.

I.

The Refusal of the Court Below to Instruct the Jury on the Doctrine of Res Ipsa Loquitur Was Not Erroneous.

The doctrine of *res ipsa loquitur* is applicable only where certain conditions exist. Among these are:

(1) "The occurrence is otherwise unexplained" [*Manhat v. United States,* 220 F. 2d 143, 146 (2d Cir. 1955), *cert. den.* 349 U. S. 966 (1955).]; and

(2) "The accident was more likely than not the result of defendant's negligence" [*Berryman v. Bayshore Construction Company,* 207 A. C. A. 350, 352 (1962).]

It is clear from the evidence in this case that the fish which struck appellant was dropped by a fellow crewmember, Vido Druskovich, as a result of the hook with which Druskovich was lifting the fish pulling from the fish's eye.

There is accordingly no question as to *how* the accident occurred. It occurred when the fish being lifted by Druskovich "got away from him" and fell onto appellant. There is likewise no question as to *why* the fish fell. It fell because the hook being used by Druskovich pulled from its eye.

Appellant, however, argues that this does not constitute a sufficient explanation of the occurrence; that it must further be affirmatively shown *why* the hook pulled from the fish's eye. We must suppose that if it were shown that the hook pulled from the eye because an adjacent bone in the head broke, appellant would then argue that the doctrine were still applicable because there was no positive showing as to *why* the bone broke. Appellant's argument may be carried to the point where, unless and until every last minute detail of every aspect of a case is fully explained by the defendant, there is an inference of negligence. One need only attempt to answer the series of "Why" questions posed by a pre-school child to realize the futility of the task this proposition would present.

The doctrine has been applied only in those situations where the reason the accident occurred was not

explained. Such a case is *Johnson v. United States,* 333 U. S. 46 (1948), cited by appellant. This case involved a block which was dropped on libelant. The man who dropped the block was not produced as a witness, and it is apparent little or no effort was made to explain how or why the block was dropped. We know of no decision applying the doctrine where, as in the present case, the reason the accident occurred is explained. Here the evidence has gone beyond an explanation of how and why the accident occurred. The three possible reasons for the hook pulling from the eye were testified to as being: (1) the fish's eye was soft, (2) the bones of the fish broke, or (3) the hook broke.

It is apparent the hook did not break, for had it done so, this would have been known. The absence of this possibility is conceded by appellant by his choosing not to proceed on a theory of breach of warranty of seaworthiness.

The remaining possibilities present a case where "the evidence does not disclose a balance of probability in favor of negligence on the part of the defendant".

> On the state of the evidence before it, and the record before us, the trial court was correct in refusing the *res ipsa* instructions because the facts do not justify the application of the doctrine.

* * *

> The doctrine does not apply where the evidence does not disclose a balance of probability in favor of negligence upon the part of the defendant. "The applicability of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of defendant's negligence. 'Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply.'" (*Tucker v. Lombardo,* 47 Cal.2d 457 [303 P.2d 1041] at p. 465.) *Berryman v. Bayshore Construction Company, supra.*

The inference raised by the evidence in this case, including the testimony of appellant, is one of absence of negligence. Mr. Ursich testified that Druskovich was a good and experienced fisherman [Tr. p. 74] and was handling the fish in the usual and proper manner [Tr. pp. 87, 88]. In answer to the question "Would you conclude that Vido was careless?", Ursich stated "No, no, I can't say . . .", at which time he was interrupted by his attorney [Tr. p. 91].

Appellees respectfully submit that the instant case does not present a proper situation for the application of the doctrine of *res ipsa loquitur* and that the court below was correct in refusing to charge the jury on this doctrine.

II.

The Giving of Appellees' Instruction That No Inference of Negligence Could Be Drawn From the Mere Happening of the Accident Was Not Erroneous.

Appellant bases his contention of error in giving appellees' instruction No. 27-A on his contention of the applicability of the doctrine of *res ipsa loquitur*. What we have said with regard to that question is therefore likewise applicable here.

Appellees submit that the mere occurrence of an accident does not give rise to an inference of negligence. Such an inference arises only upon the showing of additional circumstances which did not exist in this case.

III.

The Giving of Appellees' Instruction on Contributory Negligence Was Not Erroneous.

There was ample evidence that Ursich had his head above the level of the hatch and watched Druskovich handle the fish on the deck. Had the jury concluded appellees were negligent, it could have further found that Ursich failed to exercise reasonable care to watch for and avoid being struck by a fish which might slide into the hatch from the slippery deck. The evidence was accordingly sufficient to warrant an instruction on contributory negligence. The instruction given reflected the maritime rule of comparative negligence. A finding of no negligence on the part of appellees is implicit in the verdict. It is apparent the question of appellant's contributory negligence was never reached.

IV.

The Court Did Not Err in Refusing to Award Appellant Interest on the Maintenance Awarded Him.

In view of the medical testimony, which appellant chose not to bring before this reviewing court, the amount of maintenance to which appellant was entitled was not certain. In order to expedite the case, appellees stipulated to an award of maintenance in the total amount of $1,000. After obtaining this stipulation, Ursich's counsel advised the court that "most of the judges" have awarded interest, and that he was asking for it "as a matter of principle" [Tr. pp. 200-201].

Appellant now argues that interest is something to which he is absolutely entitled "in the absence of a finding of 'peculiar facts' ". Such "peculiar facts" existed in this case, as is evidenced by the court's comment, "The court feels that for the purposes of the argument that you are not entitled to interest, and Mr. Wright can leave the interest out, and then you have perfected your record on appeal, if you want one." [Tr. p. 201]. The absence of a formal finding on this point is a result of appellant's own request that findings be waived.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GORDON K. WRIGHT